STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois, Petitioner	)	
Rate MAP-P Modernization Action Plan – Pricing Annual Update Filing	)	Docket No. 13-0301

MOTION OF AMEREN ILLINOIS COMPANY TO STRIKE PORTIONS OF THE REPLY BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS

Parties to an administrative proceeding have the right to confront assertions of adverse witnesses. And administrative agencies must base their findings only on the evidence included in the record. These two legal principles are violated when parties are permitted to introduce new non-legal opinions, positions and analyses in briefing after the evidentiary hearing has concluded. That is exactly what has happened here. The Reply Brief of the People of the State of Illinois contains new non-legal opinions, positions and analyses that should have been introduced through the Attorney General's expert witness, not its post-hearing briefing. Since there was no witness to sponsor these statements, there was no opportunity to challenge them through testimony or cross-examination, and there are no record citations to support them. The Commission cannot consider these statements and should not include them in the final order in this proceeding. The objectionable statements have been identified in the accompanying Appendix. Pursuant to 83 Ill. Adm. Code § 200.190, Ameren Illinois Company d/b/a Ameren Illinois (AIC) requests the Commission issue an order striking these statements from the record.

I. BACKGROUND

The Attorney General appeared on behalf of the People of the State of Illinois in this proceeding and submitted the expert testimony of Mr. Michael Brosch. Among the adjustments

proposed by Mr. Brosch in his testimony were adjustments to Account 909 Advertising expense and Account 930.2 Public Relations expense. (AG Ex. 1.3C2.) The discussion in the AG's Reply Brief on these adjustments, however, is not limited to the opinions, positions and analyses presented in Mr. Brosch's testimony. Instead, the AG's Reply Brief introduces new expert opinions, positions and analyses in support of Mr. Brosch's adjustments to Simantel expenses.

In direct testimony, Mr. Brosch proposed an adjustment to remove Simantel expenses that AIC had identified in discovery as potentially comparable to costs that the Commission disallowed in Docket 12-0293. (AG Ex. 1.0C, p. 36:796-99.) No supporting explanation or analysis was provided. (*Id*.) It appeared the adjustment was solely "based upon the Company's search and identification of potentially comparable expenses." (*Id*., p. 36:797-98.) Mr. Brosch also proposed an adjustment to remove one half of the remaining jurisdictional electric expense for Simantel recorded as Public Relations expense. (*Id*., pp. 38-41.) Unlike the adjustment for potentially comparable expenses, this adjustment was not based on specific invoiced costs—it was a general disallowance factor that Mr. Brosch deemed appropriate based on his review of Simantel invoices that AIC provided in discovery. (*Id*., pp. 39-41.) The rationale provided by Mr. Brosch was that "significant portions of Simantel's work in 2012 [were] not necessary for the provision of regulated electric delivery service and [were] motivated primarily by a goal of enhancing the public image and reputation of Ameren." (*Id*., p. 40:880-83.) The adjustment was "pending more review and confirmation of the nature of work done for AIC by this vendor," including materials submitted in response to AG data request 5.09. (*Id*., p. 38:849-50.)

In rebuttal testimony, Mr. Brosch did not revise these adjustments. Mr. Brosch confirmed that he had not performed an "independent critique" of the potentially comparable Simantel charges. (AG Ex. 3.0C2, p. 21:455-56.) And he confirmed that he had "relied upon a

Company-prepared search for 'potentially comparable expenses' incurred in the test year." (*Id*., p. 21:443-44.) He did not offer any additional analysis on these expenses. Mr. Brosch also confirmed that he "did not exhaustively analyze each vendor charges incurred by the Company" to prepare his adjustment for other Simantel expenses. (*Id*., p. 21:448-49.) And he confirmed he "applied a 50 percent disallowance factor to the Simantel public relations charges in place of a more detailed review." (*Id*., p. 21:450-52.) The only further analysis presented in Mr. Brosch's rebuttal on these charges was a bulleted list of descriptions of Simantel work product provided in AIC's rebuttal exhibits. (*Id*., pp. 25-26.) He concluded that the 11 descriptions that he identified "support[ed] [his] conclusion that a significant portion of the incurred costs were to enhance the image and public reputation of Ameren, rather than meet any specific business need." (*Id*., p. 25:533-34.) Although Mr. Brosch had reviewed the materials submitted in response to AG data request 5.09, he did not identify any specific attachments or provide any specific commentary. He simply testified that "[a] review of the materials provided in this response as attachments supports the conclusion reached in my Direct Testimony that Simantel's work and charges to Ameren represent a blend of reasonably needed administrative and advertising support, along with a number of activities and costs that are entirely discretionary and not needed to provide safe adequate utility services in Illinois." (*Id*., pp. 26-27:560-64.)

The AG's Reply Brief now offers new expert opinions, positions and analyses on these adjustments, ones that Mr. Brosch should have presented in his testimony. The statements identified in the Appendix generally fall in two categories: (1) new opinions and positions in support of Mr. Brosch's adjustment to remove a Simantel expense ($4,125) in Account 909; and (2) new analysis of attachments produced in response to AG data request 5.09.

Statements Nos. 1-4 introduce a new opinion that some of the disputed charges should

have been recovered through AIC's Energy Efficiency and Demand-Response Cost Recovery rider (Rider EDR). This opinion was not included in Mr. Brosch's, or anyone else's, testimony. There is no record citation to support the AG's new theory. Indeed, the only citation provided by the AG was to AIC witness Mr. Thomas Kennedy's cross-examination, and his answer to the AG's question made it clear he did not know whether similar charges should have been recovered through Rider EDR. The only other evidence on Rider EDR was provided in AIC's direct testimony, which indicated AIC had reduced its proposed revenue requirement to remove the expenses in Account 908, not Account 909, which AIC recovered through Rider EDR. (AIC Init. Br. 74 n.13.)

Statements Nos. 5-14 introduce new analyses of attachments provided in response to AG data request 5.09. These statements argue that the content of the attachments demonstrates Simantel's services relate, at least in part, to generation, transmission and Missouri activities. Mr. Brosch could have presented this same analysis of the content of these materials in his rebuttal testimony. But he did not.

In this proceeding, the Case Management Plan (issued June 4, 2013) required Intervenor rebuttal testimony to AIC and to each other to be filed on August 26, 2013. The opinions, positions and analysis included in the statements in the Appendix should have been included in Mr. Brosch's rebuttal. That did not occur. These statements are not legal arguments the AG waited to make in briefing based on record evidence. They are substantive opinions, positions and analyses that should have been offered by Mr. Brosch in his pre-filed testimony. It is improper for the AG to now use its reply brief as a procedural mechanism to inject these opinions, positions and analyses into the record for the Commission's consideration.

III. ARGUMENT

Post-hearing briefing is not an opportunity to respond to evidence and statements properly offered in a utility's surrebuttal testimony. It is also not an opportunity to otherwise bolster your party's case in chief. The opinions contained in statements Nos. 1-4 should have been disclosed in testimony; since they were not, AIC could not introduce factual evidence that undercuts the speculation. The analyses contained in statements Nos. 5-14 also should have been disclosed in testimony; since they were not, again, AIC did not have the opportunity to test the basis of the AG's opinions. It would be a violation of due process principles for the Commission to consider the new opinions in the AG's Reply Brief, without AIC having the opportunity to rebut and examine the AG's expert on these assertions. And it would be reversible error for the Commission to rely upon new expert analysis not already in the record. In either case, the AG cannot credibly cast these statements as permissible legal argument. A coordinated case schedule was established to allow for the orderly presentation of evidence and the parties' non-legal positions. The AG's attempt to add new testimony in briefs upends that schedule.

A. The new opinions, positions and analysis in the AG's Reply Brief in support of Mr. Brosch's adjustments were not timely disclosed in testimony.

As noted in other Motions to Strike pending before the Administrative Law Judges in this proceeding, due process in administrative proceedings requires "the opportunity to be heard" and "the right to cross-examine adverse witnesses." *Gigger v. Bd. of Fire & Police Comm'rs of City of East St. Louis*, 23 Ill. App. 2d 433, 439 (4th Dist. 1959); *see also Abrahamson v. Ill. Dep't of Prof'l Reg.*, 153 Ill. 2d 76, 95 (1992); *Balmoral Racing Club, Inc. v. Ill. Racing Bd.*, 151 Ill. 2d 367, 400-01 (1992) ("cross-examination is required in order to ensure that due process requirements are met"). The consideration of evidence, without allowing an opposing party the opportunity to cross-examine or respond, contravenes due process. *See*, *e.g.*, *Ill. Comm. Comm'n*

v. Ill. Gas Co., Docket 02-0170, Order, 2003 Ill. PUC LEXIS 682, *35-36 (Aug. 6, 2003) (no consideration given to expert qualifications submitted for the first time in reply brief on exceptions); *Ill. Bell Tel. Co.*, Docket 00-0260, Order, 2001 Ill. PUC LEXIS 871, *20-21 (Sept. 12, 2001) (auditor's participation in proceeding critical to afford parties opportunity to present and cross-examine witnesses relative to the issue of tracking merger related costs in order for due process concerns to be satisfied); *Commonwealth Edison Co.*, Docket 92-0121, Order, 1995 Ill. PUC LEXIS 232, *25-26 (Apr. 12, 1995) (no consideration given to proposal offered after evidentiary hearing concluded without benefit of fundamental right to cross-examination by the other parties); *Ill. Comm. Comm'n*, Docket 94-0066, Order, 1995 Ill. PUC LEXIS 176, *266-68 (Feb. 23, 1995) (late introduction of Staff's new modifications proposed for the first time in brief, which were not tested in cross-examination and which no party had the opportunity to address for the record, would violate fundamental fairness and abridge other parties' due process). The prior case law and Commission opinions make this point evident: the opportunity to confront opposing litigants is essential to challenge the basis for their positions; without that opportunity, litigants are precluded from testing the strength of the factual evidence underling an opposing party's assertions, and conversely expose the weakness of any unsupported conjecture.

A coordinated case schedule is established in Commission proceedings to allow for an orderly presentation of the evidence and the parties' positions. This process ensures utilities have the opportunity to cross-examine adverse witnesses and submit evidence in response to their claims. That orderly presentation and the required opportunity to respond, however, cannot happen, when post-hearing briefing becomes the mechanism to unveil new positions or buttress prior positions with new evidence or assertions. This is not to say that parties must testify on legal arguments. But parties must give notice of expert opinions and recommendations and

present them through witness testimony or other evidence. The conjecture of counsel in a brief is not a substitute for the timely disclosure of substantive proposals. The right to confront witnesses in the hearing room is a fundamental right of any litigant. This is precisely why the Commission has rounds of prefiled testimony: to disclose positions and allow parties to respond.

Here, the opinions in statements Nos. 1-4 in the Appendix opine on the recoverability of charges through Rider EDR. But Rider EDR was not mentioned in Mr. Brosch's testimony. And no facts were introduced to establish the disputed charges should have been recovered through Rider EDR. The AG claims "Mr. Brosch did not need to provide any analysis beyond Ameren's defense of that payment because it demonstrates that the cost should not be included in formula rates." (AG Rep. Br. 20.) Not so. Indeed, the only evidence the AG is able to cite (Mr. Kennedy's cross-examination) demonstrates just the opposite—that there is no factual basis to conclude the charges should have been recovered through Rider EDR.

The AG's witness could have presented this position in testimony. *See*, *e.g.*, *Commonwealth Edison Co.*, Order, Docket 11-0721, pp. 100-102 (Nov. 28, 2012)(although some disputed advertising referenced specific energy efficiency programs, they were still recoverable through formula rates, if not recovered through the utility's energy efficiency and demand response rider). But unlike Docket 11-0721, where Staff provided testimony in support of its position that the disputed advertising expenses should be recovered through the energy efficiency and demand response rider, no such testimony was presented here. As for the analysis in statements Nos. 5-14 in the Appendix, the same is true—Mr. Brosch, although he had the very same attachments discussed at length in the AG's Reply Brief at his disposal, did not provide any testimony on the content of those materials. That counsel for the AG may have conducted its own after-the-fact analysis of the materials does not mean that substantive analysis may now be

presented for the first time in the Reply Brief. Since the AG withheld these opinions, positions and analyses, AIC did not have the opportunity to test them. Since AIC did not have the opportunity to test them, the Commission must not consider them.

B. The Commission may not consider opinions not in the record evidence.

As also noted in other pending Motions to Strike, "any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case." 220 ILCS 5/10-103; *see also* 5 ILCS 100/10-35(c) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed."); 83 Ill. Adm. Code § 200.800(a) ("Statements of fact in briefs and reply briefs should be supported by citation to the record."); *Chicago & E.I. Ry. Co. v. Ill. Comm. Comm'n*, 341 Ill. 277, 285 (1930) (Commission findings "must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."). To do otherwise constitutes reversible error. *Bus. & Prof'l. People for Pub. Interest v. Ill. Comm. Comm'n*, 136 Ill. 2d 192, 227 (1989) (Commission committed reversible error when it disregarded record evidence on the issue of used and useful and improperly relied on the circumstances of a settlement). To the extent new opinions are arguments of counsel, they are not evidence on which the Commission can base a decision. *Johnson v. Lynch*, 66 Ill. 2d 242, 246 ("The argument of counsel cannot be considered evidence….").

The opinions, positions, and analyses in statements Nos. 1-14 do not constitute "evidence" properly admitted into the record. Nor are they legal arguments. They are the theories of the AG's counsel. Therefore, the Commission cannot rely on them for its findings and decisions. That the AG's Reply Brief may be part of the record on appeal does not mean the

Commission can rely on theories that should have been disclosed in prefiled testimony. There is a stark difference between a legal argument that applies prior Commission decisions, statutes and administrative rules and the ratemaking opinions customarily offered by witnesses in testimony. The AG opinions in the Appendix are most certainly the latter. The Commission cannot base its findings on the AG's adjustments on these Reply Brief opinions without producing grounds for reversal.

IV. CONCLUSION

The nature of litigation is for one to fully present his or her case and have the opportunity to fully challenge the other's case, both before and during the hearing, and not just after. This process helps to ensure the due process rights of the petitioner are not violated. This process also ensures the tribunal has a sufficient factual record to support its findings. Yet, this process breaks down once parties are able to mutely participate in a Commission proceeding and then unveil brand new opinions, positions and analyses in post-hearing briefs. The AG's withholding of the statements in the Appendix until its Reply Brief prevented AIC from testing the merits of the opinions, positions and analyses through surrebuttal testimony or cross-examination. But that withholding also prevented the AG from providing the proper citations to the record for its theories. The Commission should not give any weight to the statements in the Appendix.

No.	Objectionable New Opinions and Positions in the People's Reply Brief	Citation
1	"The ActOnEnergy costs are part of Ameren's energy efficiency and demand-response program costs, Tr. at 138, and those costs should be recovered solely through the Rider EDR. This is necessary to assure that the cost of these programs does not exceed the statutory maximum charge."	AG Rep. Br., pp. 20-21.
2	"Ameren's description of the activities associated with this $4,125 cost ("Simantel's services on an ActOnEnergy workshop for contractors and employees on the Energy Efficiency Team.") confirms that these costs should not be included in formula delivery service rates but should be included in the rider recovery of energy efficiency costs. While AIC witness Kennedy was aware of the energy efficiency rider, he did not know whether the ActOnEnergy costs were recovered through the rider. Tr. at 138- 139 (Sept. 16, 2013). Allowing these costs to be included in formula delivery service rates risks increasing the energy efficiency charges to more than allowed under the law and is at odds with Ameren's Rider EDR that provides for rider recovery of energy efficiency and demand response costs."	AG Rep. Br., p. 21
3	"Other expenses related to "ActonEnergy" or energy efficiency, which should be recovered in Rider EDR…."	AG Rep. Br., p. 24.
4	"Attachment 12: ActOnEnergy: energy efficiency expense, appropriate for Rider EDR."	AG Rep. Br., p. 27.
5	"relate to generation resources (lines 13-14)"	AG Rep. Br., p. 24.
6	"The chief work products produced in AIC/AG Group Cross Exhibit 1 addressed the obligations of Ameren Corporation, with a major focus on generation issues. Attachments 5, 6 and 7 are multi-page documents prepared for Ameren Corporation. Attachments 5 and 6 are presentations by "Ameren" with major focus on generation challenges."	AG Rep. Br., p. 26.
7	"Attachment 5 has 22 pages, but only 3 refer to Illinois delivery service (pages 14, 17, 18). Attachment 6 has 31 pages, but only one addresses Illinois (page 25)."	AG Rep. Br., p. 26 fn. 11.
8	"The summary of topics found on page 5 of the attachment includes only two items that are delivery related: Technology: automation of grid operations, and Customer of the Future: customers will expect reliability. The remainder of the document focuses on generation and transmission issues."	AG Rep. Br., p. 26 fn. 12.
9	"Attachments 3 and 4: media schedules for all media markets, including Illinois and Missouri and energy efficiency, generation and goodwill advertising;"	AG Rep. Br., p. 27.
10	"Attachments 10, 11, 13, 14, 15: single page safety posters, that can be used by any Ameren division (Illinois delivery, Missouri delivery, transmission, generation)"	AG Rep. Br., p. 27.
11	"or addressed generation issues"	AG Rep. Br., p. 28.
12	"or the majority of the communications address generation, transmission and Missouri operations."	AG Rep. Br., p. 28.
13	"relate to generation"	AG Rep. Br., p. 29.
14	"are primarily generation related"	AG Rep. Br., p. 29.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on October 21, 2013, I caused a copy of the foregoing *Motion of Ameren Illinois Company to Strike Portions of the Reply Brief of the People of the State of Illinois* to be served by electronic mail to the individuals on the Commission's Service List for Docket 13-0301.

/s/ Albert D. Sturtevant
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